STATE OF CONNECTICUT
APPELLATE COURT

ELIYAHU MIRLIS	:	A.C. NO. 45344
	:	NNH-CV-17-6072389S
Appellee	:	(J.D. New Haven)
	:	
v.	:	
	:	
YESHIVA OF NEW HAVEN INC.	:	
	:	
Appellant	:	APRIL 20, 2022

APPELLANT'S OBJECTION TO MOTION TO TERMINATE STAY

Pursuant to Practice Book § 61-11(d and e) the appellant, Yeshiva of New Haven, Inc. ("Yeshiva"), respectfully objects to the Motion to Terminate Stay (the "Motion") filed by plaintiff, Eliyahu Mirlis.

I. BRIEF HISTORY OF THE CASE

A. The Underlying Judgment and this Foreclosure Case

On June 6, 2017, final judgment entered against the Yeshiva and Daniel Greer ("Greer") and in favor of plaintiff, Eliyahu Mirlis (the "Plaintiff" or "Mirlis") in the U.S. District Court case styled *Eliyahu Mirlis v. Daniel Greer, et al.,* Case No. 3:16-CV-00678 (the "District Court Case") in the amount of $21,749,041.10 (the "Judgment"). On July 7, 2017, Plaintiff filed a certificate of judgment lien (the "Judgment Lien") against the property known as 765 Elm Street, New Haven, Connecticut (the "Property") with the Office of the City Clerk for the City of New Haven, Connecticut.

ORAL ARGUMENT REQUESTED

Thereafter, on July 27, 2017, Plaintiff initiated the instant action by filing a complaint seeking foreclosure of the Judgment Lien. Following discovery, the Court (Baio, J.) conducted a hearing concerning the fair market value of the Property. The parties filed post-hearing briefs on January 27, 2020. On February 24, 2020, the Court (Baio, J.) issued her *Memorandum of Decision: Hearing on Valuation* at 9, Doc. No. 133 (the "Valuation Ruling") holding the property was worth $620,000.00 Doc. No. 133.00. Thereafter, on March 9, 2020, the Court (Baio, J.) entered a judgment of strict foreclosure (the "Foreclosure Judgment"). Defendant appealed the Ruling and Foreclosure Judgment, which was upheld. *See Mirlis v. Yeshiva of New Haven, Inc.*, 205 Conn. App. 206, *cert. denied.*, 338 Conn. 903 (2021).

Thereafter, upon remand to the trial court, Defendant moved to substitute a bond for the Judgment Lien. On January 24, 2022, the Court (Cirello, J.), entered a *Memorandum of Decision on Defendant's Motion to Open Judgment and Extend the Law Day Entry No. 153* (the "Extension Order"), denying Defendant's request to substitute a bond, but extending the law day. Within the Extension Order, the Court held: "The Court would need more than the representations made by YESHIVA's counsel to find that equity requires an opening of the judgment and extending of the provided to ELIYAHU when and how the cash bond would come into being, or any

assurances that the debt owed would be paid. As such, the motion to open the judgment and extend the law day is denied, and the objection thereto is granted."

On February 3, 2022, Defendant filed another Motion to Open Judgment and Extend Law Day (Docket Entry 162.00), setting forth new information addressing issues raised by the Court, including details regarding a pending, imminent real estate sale and other funds that would be used to fund the cash bond.

On February 18, 2022, the Court issued its Order denying Defendant's renewed Motion to Extend/Substitute because: "[i]n this court's order dated January 24, 2022 (Entry No.: 159.00) the court enumerated reasons why that motion to open was denied. The first reason on page two states: '1. YESHIVA currently does not have enough funds to produce the cash bond.' This fact has not changed. This eliminates any legal arguments that were made by YESHIVA."

On March 10, 2022, Defendant filed its *Motion for Reargument* (Doc. No. 167.00) because: (1) at the time of the Court's February 18, 2022 Order, the Court did not have the benefit of Judge Haight's February 21st Second Edgewood Elm Ruling, which makes clear there would be no windfall to Defendant if collateral is substituted, and (2) the Sale could have

closed prior to February 18th but for Plaintiff threatening the Non-Profit Entities with sanctions – and will close forthwith if this Court rules that Defendant has a legal right to substitute the previously-determined bond amount. Indeed, counsel for the counterparty to the sale of real estate specifically stated he had the funds necessary to close in his trust account.

As further described below, had the Court allowed the substitution of the bond: (i) Plaintiff would have received $620,000 in cash and (b) the Property would have been transferred to a Non-Profit Entity (defined below).. The Court (Cirello, J.) denied the Motion to Reargue without holding a hearing or issuing a detailed written opinion. Doc. No. 167.10.

B. Plaintiff's Concurrent Lawsuit in U.S. District Court Against Non-Profit Entities

For many years Defendant has been funded primarily through donations from other non-profit entities. These entities owned residential and commercial real estate and used the proceeds to further the charitable purposes of Defendant. On May 8, 2019, Plaintiff commenced a lawsuit against Edgewood Elm Housing, Inc.; F.O.H., Inc.; Edgewood Village, Inc.; Edgewood Corners, Inc.; and Yedidei Hagan, Inc. (collectively, the "Non-Profit Entities") asserting two claims to reverse-pierce the corporate veil and to hold the Non-Profit Entities liable for the Judgment. The case is styled *Mirlis v. Edgewood Elm Housing, Inc.*, Civil Action No. 3:19-cv-700

(D. Conn.) (the "Edgewood Elm Action") and is presided over by the Honorable Charles S. Haight, Jr., Senior United States District Judge.

Within the Edgewood Elm Action, Judge Haight entered a temporary restraining order ("TRO") injunction preventing the Non-Profit Entities from transferring or selling assets. However, Judge Haight later modified and clarified the TRO to allow the Non-Profit Entities to use or sell assets to fund the bond proposed by Defendant in the Motion to Extend/Substitute. *See Notice of Filing Ruling Concerning Defendant's Access to Funds from Supporting Foundation*, Doc. No. 158 (the "First Edgewood Elm Ruling"). As set forth in the Edgewood Elm Ruling, the Yeshiva's financially supporting foundation, Yedidei Hagan, Inc. ("Yedidei Hagan"), as well as the other related non-profit defendant entities in that action, are permitted to use funds to substitute a cash bond if authorized by this Court, as those funds would be for the financial benefit of Mr. Mirlis.

After the First Edgewood Elm Ruling entered, one of the Non-Profit Entities, Edgewood Village, Inc. ("Edgewood Village"), entered into a contract for sale (the "Sale") for two properties it owned, which would result in net proceeds of $573,603.01. *See Motion to* Reargue, Doc. No. 167, Sale Contract, Exhibit C; Draft Closing Statement, Exhibit D.

However, before the closing of the Sale could occur, counsel for Plaintiff wrote to counsel for the Non-Profit Entities threatening that if the closing went forward, Plaintiff, in the Edgewood Elm Action, would seek sanction, including contempt. Id., Beatman Letter, Exhibit A. As a result, Edgewood Village did not proceed with the closing, pending this Court's ruling on the Motion to Extend/Substitute.[1] Nevertheless the purchaser of the Edgewood Village properties (the "Buyer"), who is represented by Neil Lippman, Esq., has confirmed that it is ready and able to close as soon as this Court grants the Motion to Extend/Substitute. Id., Lippman Letter, Exhibit B.

On February 21, 2022, in the Edgewood Elm Action, Judge Haight issued a *Ruling on Plaintiff's Motion for Reconsideration [Doc. 99]* at 22-23 (the "Second Edgewood Elm Ruling," Exhibit E) holding that if this Court were to grant the Motion to Extend/Substitute, the Property must be transferred to the Non-Profit Entities.

[1] Plaintiff also moved for reconsideration of the First Edgewood Elm Ruling, arguing, inter alia, that if non-profit properties were sold in order to raise funds to substitute collateral in this case, the Yeshiva Property should be required to be conveyed to one of the non-profit defendants in that case – and not go to the Yeshiva free and clear – so that it was still subject to possible judgment in Plaintiff's favor. That motion was still pending at the time of oral argument before the Court on February 18, 2022.

II. SPECIFIC FACTS RELIED UPON

Plaintiff initiated this action to foreclose its Judgment Lien. Despite this Appellate Court affirming judgment, Plaintiff appears to no longer want the Valuation Ruling enforced. The parties agree that the value of the Property is far less than the Judgment. Judge Baio ***already held*** the Yeshiva can substitute a bond for $620,000. Plaintiff did not appeal that decision. The only issue on appeal was whether the amount of the valuation was too high. The fact that the Appellate Court affirmed Judge Baio's valuation does not mean that the other holdings within the Valuation Ruling are now void. To the contrary, it is a final judgment affirmed on appeal. Thus, it should be honored.

Moreover, the evidence provided to the trial court demonstrates that the sale, combined with other cash held by the Non-Profit Entities, would generate sufficient cash to pay Plaintiff the $620,000 ordered by Judge Baio as the amount for substitution of a bond. *See Defendant's Reply Memorandum in Support of its Motion to* Reargue, Doc. No. 166.00. Defendant's position was, and is, that it had both the right and means to adhere to the Valuation Ruling and substitute a bond in the amount of $620,000.

III. LEGAL GROUNDS RELIED UPON

A. The Appellate Stay Generally

Pursuant to Practice Book § 61-11(d) the automatic stay on appeal applies unless terminated because "the judge who tried the case is of the opinion that… the due administration of justice so requires." The trial court "shall hold a hearing prior to terminating the stay." *Id.* When assessing a motion to terminate the appellate stay: "[t]he factors to be considered include the irreparability of the prospective harm to the applicant, the effect of the delay on other parties as well as upon the public interest, and the likelihood that the appeal will be successful." *BNY W. Tr. v. Roman*, 2015 WL 3555257, at *2 (Conn. Super. May 11, 2015); *Griffin Hospital v. Commission on Hospitals and Health Care,* 196 Conn. 451 (1985). The burden is on the appellee to demonstrate cause to terminate the stay. *TAOM Heritage New Haven, LLC v. Fuun House Productions, LLC, 2019 Conn. Super. LEXIS 1434, at *5 (Super. Mar. 25, 2019)* ("[a]lthough this court firmly believes that its factual findings are correct and its judgments just, it is also humble enough to allow the defendants their ability to appeal the court's decisions, without effectively mooting that appeal.").

B. Defendant Has Submitted a Bona Fide Appeal

This appeal challenges several decisions of the Trial Court, including: (1) its refusal to re-open the judgment to allow Defendant to substitute a bond, (2) its requirement that Defendant have cash on hand before substitution would be permitted (despite evidence showing that such cash would be imminently available upon the Court's approval of a substitution), and (3) its refusal to reach Defendant's argument that it had a right to substitute as a matter of law, based on earlier rulings in the case by Judge Baio and the Appellate Court. Specifically, Judge Baio ruled that Defendant may substitute a bond for $620,000. Defendant has now been precluded from doing so. Nothing in the Valuation Ruling placed a time limit on the Yeshiva's right to substitute a bond. Plaintiff never asked for a time limit and did not question the Yeshiva's right to substitute until the case came before this Court *after appeals were exhausted*. In sum, Defendant's position is that the Valuation Ruling is an Appellate Court-affirmed judgment that must be respected by both sides in this matter.[2]

[2] Plaintiff's argument that the right to substitute a bond is cut off on entry of a judgment of foreclosure makes no sense and the cases he cites are inapposite. The statute the Court is called on to construe here, Conn. Gen. Stat. § 52-380e and the legislative history, demonstrate that the Defendant is using the statute precisely as drafted: to protect property from a creditor who seeks to exert non-monetary pressure by selling off a beloved asset.

The appeal will also raise an apparent issue of first impression -- whether appealing the Valuation Ruling terminates the right to substitute a bond. Defendant had a statutory right to appeal the Valuation Ruling, which it did. If the valuation ruling could not be appealed *before* a bond is substituted, no party would ever really have the right to appeal the valuation. Again, there is nothing in any order of any court time limiting Defendant's right to substitute a bond. As Defendant had the statutory right to *both* appeal and substitute a bond, there is no reason why it should not be able to exercise them now.[3]

Moreover, the time to substitute the bond cannot have expired because Judge Baio did not set a time for expiration and the relief requested by Plaintiff would effectively void a key aspect of the Valuation Ruling. The cases referenced by Plaintiff, in its opposition to Defendant's substitution of a bond, *Hartford Electric Light Co. v. Tucker*, 183 Conn. 85 (1981) and *Anthony Julian R.R. Contr. Co. v. Mary Ellen Drive Assoc.*, 1994 Conn. Super LEXIS 2044 (Conn. Super. Aug. 16, 1994) both deal with *pre-judgment* lien rights and substitution was not sought until after judgment. Here, the lien on the Yeshiva was a judgment lien – not a *pre-judgment lien*. The entire purpose of Conn. Gen. Stat. § 52-380e would be undermined if it could be cutoff by a party merely by appealing an adverse ruling.

[3] Plaintiff's citation to *HSBC Bank USA* v. *Kriz*, 2011 Conn. Super. LEXIS 77, at *6-7 (Super. Jan. 14, 2011) is inapposite there, the appellate stay was lifted because the appellant was appealing a mater *already decided* by the Appellate Court: "[t]he only judgment entered by this court that the defendant could intend to challenge is the judgment of strict foreclosure reentered on September 23, 2010 (#143.04). Since it is clear that the Appellate Court has dismissed the defendant's first appeal of this court's judgment of strict foreclosure (#113.01), the only conclusion that the court

C. Application of the *Griffin Hospital* Factors Favors Denial of the Termination of the Appellate Stay

1. Basis for Appeal and Likelihood of Success

The appeal was not filed "only" for delay. As noted above, the appeal raises several substantial issues of fact and law, and the Yeshiva believes it can prevail before the Appellate Court. Specifically, there are two statutory construction issues of first impression that must be addressed: (i) whether the holding in Judge Baio's Valuation Ruling that Defendant has the right to substitute a bond in the amount of $620,000, was somehow time limited even though no end point to exercise the right was set by Judge Baio or any other court and (ii) whether appealing the Valuation Ruling cut off Defendant's right to substitute a bond, which would render any appeal an automatic loss. This appeal was filed to vindicate Defendant's right to follow the prior order of this Court and substitute the bond approved and affirmed on appeal. Defendant has, thus, set forth a valid basis for appeal.

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can draw is that the defendant's October 1, 2010 appeal is dilatory." Here, Defendant seeks to *enforce* the Valuation Ruling as affirmed by the Appellate Court and exercise its statutory right to substitute a bond for $620,000 as so ordered by Judge Baio. Defendant is not seeking to re-appeal anything.

2. Plaintiff Cannot Identify Any Irreparable Harm

If the stay is lifted, the effect would be to moot Defendant's appeal. Therefore, there would be irreparable harm to Defendant because it would lose the Property. The Property is not going anywhere. There is no mortgage on the Property and the only harm Plaintiff can point to is the fact that he believes he should be able to receive money faster. Motion at 7. However, Plaintiff *could have had* the $620,000 and the right to again pursue the Property in the Edgewood Elm Action. Having elected not to take the money, Plaintiff cannot argue that waiting until resolution of this appeal will harm it.

While Plaintiff's brief is long on rhetoric, it is short on any evidence of alleged "unwarranted delay tactics." Motion at 6, 9. The initial appeal of this matter addressed the valuation issue only. Defendant believed the Court (Baio, J.) overvalued the Property. The Appellate Court's ruling affirmed the valuation but did not vacate the order allowing Defendant to substitute a bond. Since remand, Defendant has been trying to substitute a bond, consistent with the Valuation Ruling. Plaintiff keeps objecting to Defendant doing so. Plaintiff's argument that the Property is worth less than the Judgment is irrelevant. Lack of equity in property and failure to make payments alone do not merit lifting the appellate stay. *Ocwen Loan*

Servicing, LLC v. Mordecai, 2019 Conn. Super Lexis 2677, *3 (Conn. Super. Oct. 2, 2019). Therefore, Plaintiff will not be irreparably harmed by allowing the appeal to play itself out; the property will remain intact.

Defendant, by contrast, would suffer irreparable harm if the automatic stay were to be lifted. The Yeshiva building is a unique property dating to the 19th century. If the stay is lifted, Defendant assumes Plaintiff will then proceed to sell the property. If Defendant were then to prevail on appeal, such a victory would be hollow, as the right to substitute a bond in place of unique property would at that point be moot if the Property had been sold. The automatic stay remaining in place is necessary in order for Defendant's appeal to be meaningful.

3. Resolution of this Case Will Have No Effect on Non-Parties or the Public Generally

This case involves collection efforts on the Judgment and does not implicate any public interest. Unless the "sole" purpose of an appeal is delay, the appellate stay should remain in place. *Ocwen*, 2019 Conn. Super. Lexi at *3-4 (denying motion to terminate appellate stay even though: "[t]he public interest would also be served in terminating the stay and returning this property to the market for ownership by a potentially viable new owner able to pay for taxes and municipal services and stay

current on their mortgage, thus potentially helping the property value of this parcel and the property values in the neighborhood.")

Even when the public does have an interest in terminating an appellate stay, that interest is only rarely overcome by the public's "interest in preserving a party's right to appeal." *Taom*, 2019 Conn. Super Lexis. at *6. "This right to appeal is fundamental to our system of justice and arises out of the humble and certain recognition that even with the best of intentions and human skill, mistakes can be made. When weighing these two interests, only in the most unusual and certain cases does the first interest outweigh the second." Id.

Plaintiff has not established the requisite showing to obtain relief from the appellate stay. Section 61-11(g) of the Practice Book provides that, <u>if</u> the trial court has denied at least two prior motions to open a foreclosure judgment, no automatic stay applies, and a finding of "good cause" is necessary. The implicit presumption in Section 61-11(g) is that if two or fewer motions to reopen a foreclosure judgment have been filed – as is the case here – there <u>is</u> "good cause," since the normal automatic stay rule applies to such an appeal. Defendant has not carried its burden to show a departure from the normal rules of appellate practice is justified here. Defendant's Motion should be denied.

IV. CONCLUSION

For the reasons set forth above, this Court should deny the Motion.

THE APPELLANT:
Yeshiva of New Haven, Inc.

By: /s/ Jeffrey M. Sklarz

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CERTIFICATIONS OF COUNSEL IN ACCORDANCE WITH PRACTICE BOOK § 62-7(b)(3)

The undersigned hereby certifies that pursuant to Practice Book § 62-7(b): (1) a copy of the foregoing has been delivered to each counsel of record as set forth below (which certification shall include names, addresses, e-mail addresses, and telephone numbers); (2) the foregoing document, to the extent required, has been redacted and/or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (3) the document complies with all applicable Rules of Appellate Procedure.

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